Filed 11/10/09 P. v. Couturier CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. KYLE PAUL COUTURIER, Defendant and Appellant.	D053248 (Super. Ct. No. SCE268830)

APPEAL from a judgment of the Superior Court of San Diego County, Louis R. Hanoian, Judge. Affirmed.

In March 2008 a jury found Kyle Paul Couturier guilty of one count of first degree murder under Penal Code[1] section 187, subdivision (a) (count 1). The court dismissed a charge of robbery (§ 211; count 2) and assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1); count 3) before trial. After Couturier waived his right

1 All further statutory references are to the Penal Code unless otherwise specified.

to a jury trial on a prior prison commitment allegation (§§ 667.5, subd. (b), 668), the court found that allegation true.

The court sentenced Couturier to a term of 25 years to life, plus a one-year consecutive term for the prior prison term.

On appeal, Couturier asserts (1) there is insufficient evidence to support his first degree murder conviction based on premeditation and deliberation; (2) the court erred in admitting his statements to police obtained in violation of his Fifth Amendment right against self-incrimination and due process; and (3) the court erred by allowing an officer to testify he was on parole. We affirm.

FACTUAL BACKGROUND

On Saturday, September 23, 2006, San Diego County Sheriff's Deputy Plutarco Vail went to 1530 Main Street in Ramona to investigate reports of a "person down." When he arrived, Deputy Vail made contact with Charles Johnson, a local transient, who said there was an unresponsive person nearby. Deputy Vail found 56-year-old William Froedge lying on his right side with a blood-stained white T-shirt covering his face. There was a beer can, some potato chip bags, a bottle and personal items nearby. Other than the blood near Froedge's head, there was not a large amount of blood at the scene.

Paramedics pronounced Froedge dead at the scene. He had been dead at least 24 hours. He died of blunt force trauma to the head, with acute and chronic alcohol abuse a contributing factor. An analysis of his blood revealed a blood alcohol concentration of 0.40. His body was covered in contusions and abrasions. Both eyes were swollen and bruised. His nose was broken. His lip was split, and he was missing a tooth. The tooth

was found in his stomach. He had a subgaleal hemorrhage (bleeding under the scalp) on the top and sides of his head. His right lower orbital ridge was fractured. His cheek bone was fractured. There were several fractures inside his skull.

An examination of the beer can found near Froedge revealed the presence of Couturier's DNA.

Froedge was five feet 11inches tall and weighed 139 pounds. He suffered from osteoarthritis. He had a decreased range of motion in his arms and could not raise them any higher than shoulder level. Froedge received food stamps and general relief on an electronic benefits transfer (EBT) card. He had people buy him food with his card because he had trouble walking.

On the Thursday before Johnson found Froedge's body, he spoke with Froedge at his encampment. Froedge was upset because Couturier had his EBT card. Froedge had given Couturier the EBT card so he could bring him money and food. He suspected Couturier was ripping him off. He wanted his card back and said he was going to talk to a sheriff. Later that day, Johnson returned to Froedge's encampment to pick up something he had forgotten. Couturier was there, drinking beer with Froedge.

According to Johnson, he spent the night Friday at Froedge's encampment. Froedge was not there. The next morning, he went to McDonald's. Froedge was still not at his encampment when Johnson came back around 10:30 a.m. When he came back a second time, around 2:30 p.m., Johnson found Froedge's body. Johnson admitted he had consumed half a pint of vodka on Friday and another half a pint on Saturday.

On the Wednesday or Thursday after discovering Froedge's body, Johnson spoke with Couturier. When he commented that Couturier was the last person he had seen with Froedge, Couturier became agitated and upset. Couturier told Johnson that if he found out he was talking to police he would hurt Johnson "more than what happened to [Froedge]" and told him he "didn't like[] snitches."

Vernon Moniot met with Froedge a couple of days before Froedge's body was found. They were at Froedge's encampment, drinking beer and looking at old record albums they found in a dumpster, discussing which ones might be worth some money. Froedge mentioned that he was upset with Larry Robertson. Froedge had given Robertson his EBT card so he could get Froedge food, but he believed Robertson had taken $100 from him. Froedge said he was thinking about going to the sheriff's department. At some point during the conversation, Couturier walked up. He was upset and began yelling about "snitches." Couturier told Froedge that people who snitch in jail "deserve to get fucked up the ass by someone with AIDS."

Froedge stood up. Couturier, who was 25 years old and weighed 200 pounds, pushed him, and he sat back down. Couturier began berating Froedge, calling him "disgusting" and commenting about his hygiene. Couturier threw potato chips at Froedge. Froedge told Couturier "if you don't want to be around, don't come around. You don't have to hang around me." Couturier left Froedge's encampment. Moniot left also.

Later that day, Moniot told Robertson what Froedge had said about going to the sheriff. While they were in the park having this conversation, a sheriff's patrol car drove

up. They took Robertson aside and questioned him. Later, Moniot and Robertson were sitting by a laundromat and Robertson said that he should kill Froedge because he was talking to the sheriffs. Robertson later told Moniot he was only joking when he said he should kill Froedge.

The next time Moniot went to Froedge's encampment, Froedge was lying down. He called out Froedge's name, but received no response. He came back another time and Froedge was in the same position. He called out his name again, but again received no response.

Moniot told Robertson that he was worried about Froedge. Robertson replied that Froedge "might be alright, that [Couturier] just beat him up."

Late one morning in September 2006, Couturier went to his friend Brian Sickler's house, where he kept some clothes. Couturier was wearing only pants and shoes. He was acting as though he were in a hurry. There was blood on the heel of one of Couturier's shoes and the back of his pants near the heel. Couturier told Sickler someone had accused him of stealing an EBT card and was threatening to go to the police. Couturier told Sickler he had beaten him. Couturier took a duffle bag of clothes into Sickler's bathroom. Sickler heard water running.

Sickler later told his cousin, Katrina Sais, that Couturier had killed someone. He told her Couturier came to his house with blood on his clothes and cleaned himself up. He also told her Couturier had taken and used the dead man's EBT card.

Terry Lucas, Couturier's foster brother, spoke with Couturier a couple of days after Froedge's body was found. Couturier said he had been in a fight and needed money to

get to El Cajon. He said someone had hit him in the head with a rock and that he had knocked the person out, leaving him lying face down. Couturier stated that he had "stomped the shit out of" the person.

Couturier then sat behind the store where Lucas was working. When Robertson arrived, Couturier said, "You owe me one. I took care of something for you, saved your butt." He also said something to the effect of, "I knocked him out, left him face down spitting up blood."

Richard Bodhaine was in a Jack in the Box with Couturier when they were approached by a group of boys. One of the boys said the man Couturier had been in an argument with the night before was dead. Couturier became angry and said, "Shut your fucking mouth."

Couturier told Jennifer Blile he killed someone earlier that night or the day before. He told her he had fought someone and stomped on their head. He said he had been drinking both before and after the fight. He also told her he was going to hide at Sickler's house. He told her he had already been there to take a shower and to change his clothes because they had blood on them.

Sheriff's Detective Jeffrey Maxin interviewed Couturier on three occasions. During the first interview, when Maxin identified himself as a detective, Couturier said, "You are here to talk about the guy they found in the bushes, the dead guy found in the bushes." Couturier admitted he used Froedge's EBT card, but denied doing so without his permission.

At the second interview, Detective Maxin asked Couturier about the shoes he was wearing on the day of the murder. Couturier replied, "There are no shoes."

At the final interview, Couturier admitted to beating Froedge about two days before his body was found. He said he had gotten into an argument with Froedge because Froedge was going to report the theft of the EBT card to police. He told Detective Maxin he was angry at Froedge because he was on parole and "couldn't afford someone going to the cops, because that would violate his parole status." He told Detective Maxin that Froedge had thrown the first punch. Couturier said he went to Sickler's house to clean up after the fight. He went to see Lucas after leaving Sickler's house.

When asked about the shoes he had been wearing at the time of the murder, Couturier said he had given them to a homeless man in the drunk tank. He later changed his story and said he threw them away because they had blood on them.

DISCUSSION

I. *SUFFICIENCY OF THE EVIDENCE*

A. *Standard of Review*

The critical inquiry on review of the sufficiency of the evidence is whether the record reasonably supports a finding of guilt beyond a reasonable doubt. This inquiry does not require a court to "'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.' [Citation.] Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Johnson* (1980) 26 Cal.3d 557, 576.) Thus, " ' "[i]f the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment." ' [Citations.]" (*People v. Bean* (1988) 46 Cal.3d 919, 933; *People v. Stanley* (1995) 10 Cal.4th 764, 793.) A reviewing court must accord deference to the jury and not substitute its evaluation of a witness's credibility for that of the fact finder. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

B. *Analysis*

Section 189 provides in relevant part, "All murder which is perpetrated by means of . . . willful, deliberate, and premeditated killing . . . is murder of the first degree."

"In this context, 'premeditated' means 'considered beforehand,' and 'deliberate' means 'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.' [Citations.] The process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . .' [Citations.]" (*People v. Mayfield* (1997) 14 Cal.4th 668, 767.)

In *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*), the California Supreme Court " 'identified three categories of evidence relevant to resolving the issue of premeditation and deliberation: planning activity, motive, and manner of killing. However, . . . "*Anderson* does not require that these factors be present in some special

combination or that they be accorded a particular weight, nor is the list exhaustive. *Anderson* was simply intended to guide an appellate court's assessment whether the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse. [Citation.]" ' [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.)

Here, there is substantial evidence of all three factors identified in *Anderson* relevant to proving deliberation and premeditation. Couturier was on parole at the time of the murder, providing a motive for him to prevent Froedge from reporting his involvement in the theft of Froedge's EBT card to police. In fact, Couturier admitted to police that was he was angry with Froedge because he was threatening to go to the police.

The fact that Couturier had an altercation with Froedge and then returned to the camp when no one else was present demonstrates planning. (See *People v. Manriquez* (2005) 37 Cal.4th 547, 577 ["evidence at trial revealed that defendant and the victim were engaged in a verbal altercation; several minutes thereafter elapsed, at which point defendant approached the victim, pulled a firearm from his waistband, cocked the weapon, and fired several shots to the victim's head, neck, and chest areas—conduct that, viewed as a whole, supported the jury's findings of premeditation and deliberation"].) The fact that "protracted" and "elaborate" planning activity is not in evidence does not foreclose us from finding sufficient evidence of premeditation. (*People v. Millwee* (1998) 18 Cal.4th 96, 134.)

The manner of the killing also supports an inference of deliberation and premeditation. The evidence demonstrates that Couturier did not merely strike one blow

in anger or self-defense. Rather, the autopsy and Couturier's statements to witnesses indicate he brutally beat Froedge and stomped on the head of the defenseless victim. (See *People v. Pride* (1992) 3 Cal.4th 195, 247-248 [concluding that the manner of killing supported premeditation and deliberation finding where victim was stabbed 18 times, all but one of the wounds were located in her torso, no defensive knife wounds were found, and jury could infer that defendant rendered victim helpless before the stabbing began]; accord, *People v. Silva* (2001) 25 Cal.4th 345, 369 ["The manner of killing—multiple shotgun wounds inflicted on an unarmed and defenseless victim who posed no threat to defendant—is entirely consistent with a premeditated and deliberate murder."].)

Finally, Couturier's actions following the murder support a finding of deliberation and premeditation. He went to Lucas and asked for money to leave town. He went to Sickler's home and cleaned himself up and changed clothes. (Cf. *People v. Perez* (1992) 2 Cal.4th 1117, 1128 ["[T]he conduct of defendant *after* the stabbing, such as the search of dresser drawers, jewelry boxes, kitchen drawers and the changing of a Band-Aid on his bloody hand, would appear to be inconsistent with a state of mind that would have produced a rash, impulsive killing."].)

In sum, there is substantial evidence of premeditation and deliberation supporting Couturier's conviction for first degree murder.

II. *COUTURIER'S STATEMENTS TO POLICE*

Couturier asserts the court erred in admitting statements he made to Detective Maxin as they were in violation of his *Miranda*[2] rights. Specifically, Couturier (1) challenges the admission of statements he made in his second interview on the ground his waiver of his *Miranda* rights was not voluntary and knowing; and (2) contends statements he made in the third interview were in violation of his invocation of his right to remain silent. We reject this contention.

A. *Background*

1. *Second interview*

The second interview occurred at the El Cajon jail. After Detective Maxin read Couturier his rights, the following exchange occurred:

> "[Detective Maxin:] . . . Do you understand each of these rights that I have explained to you?
>
> "[Couturier:] Uh, yeah, I guess.
>
> "[Detective Maxin:] Okay. Having in mind understanding your rights as I've told you, are you willing to talk with us?
>
> "[Couturier:] I don't understand about really too much about what for. I mean . . .
>
> "[Detective Maxin:] Well, I just want to talk to you about what we talked about the other night. Okay? But do you wanna speak with us about everything the other night?
>
> "[Couturier:] About what?

---

2 *Miranda v. Arizona* (1969) 384 U.S. 436 [86 S.Ct. 1602].

> "[Detective Maxin:] About different things that, uh, have evolved in the investigation.
>
> "[Couturier:] I, no I really don't because I'm not understanding a whole lot right now.
>
> "[Detective Maxin:] Well here's, here's the deal, Kyle. You, we can just start talking, and at any time you decide you don't wanna talk, just like you did the other night, just say it's over. That's all. It's that simple.
>
> [¶] . . . [¶] . . .
>
> "[Couturier:] I don't understand much right now. All I know is fucking, I'm stressed out.
>
> "[Detective Maxin:] Okay.
>
> "[Couturier:] I'm on a lot of different meds, drugs, and I'm . . .
>
> "[Detective Maxin:] What, what type of, what type of drugs you on?
>
> "[Couturier:] Not sure what they are. All I know is I broke down in tears in front of the psych, and he started prescribing me a bunch of medications."

Couturier then discussed how he was "stressed" and "scared" and did not "understand really why I'm here." The other interviewing officer, Detective Tom Ness, then reiterated to Couturier that any time he decided he did not want to talk, the interview would be over. When Detective Ness asked if he was thinking any better, Couturier replied, "I, I don't know. You tell me. I mean, I'm hearing voices, I'm paranoid, I'm scared to death. I break out in tears all the time." Detective Maxin agreed that jail was stressful and again reiterated that he could talk if he wanted to, and if he did not, they would end the interview.

At the Evidence Code section 402 hearing on the admissibility of Couturier's statements at the second interview, the court found that despite his claim he was on medication, how stressed he was, and his claim he was hearing voices, his answers to the questions were "direct," "to the point" and "consistent with the question." The court found Couturier's statements were "not involuntarily given" and there was no physical or mental coercion.

2. *Third interview*

The third interview, again conducted by Detectives Maxin and Ness, was on October 13, 2006, at Donovan State Prison. Detective Maxin read Couturier his *Miranda* rights and Couturier indicated he understood them. The following exchange then took place:

> "[Detective Maxin:] Having in mind understanding your rights as I've told you, are you willing to talk with me and Detective Ness?
>
> "[Couturier:] No. I wanna hear what you have to say and that's it.
>
> "[Detective Maxin:] Well, unfortunately, it's not, that's, that's not the way it works.
>
> "[Couturier:] Well then, we're done.
>
> "[Detective Maxin:] You don't wanna talk to us?
>
> "[Couturier:] No."

Detective Maxin then gave Couturier a summary of the evidence against him, to which Couturier replied, ""Charge me, or shut the fuck up and leave me alone." Detective Maxin then proceeded to engage Couturier in conversation, and Couturier again refused to talk, stating, "Now if you'd let me go back to my cell, that'd be great.

Charge me, or leave me alone please." At that point, Detective Maxin terminated the interview.

However, as the detectives were leaving the room, Couturier requested that the tape be turned back on. Detective Maxin stated, "[H]e asked at his request for the tape to go back on. . . . Why don't you tell us, you, you did request the tape go back on?" Couturier responded, "Yeah, I know." Thereafter, Couturier admitted to beating Froedge. Couturier stated, "He hit me and I frick'n, I just start[ed hitting] him back. And he started trying to kick me, and I started punching him back, and he fell back, he hit his head, and I left." When asked why the fight started, Couturier replied, "[H]e was yelling about he was gonna call the cops on me, Larry, and another friend of mine." He admitted that after he left, he went to a McDonald's to clean up and then to a friend's house where he had some clothes.

At the Evidence Code section 402 hearing on the admissibility of Couturier's statements in this interview, the court noted that Couturier "said he didn't want to talk, he wanted to listen. Then after he listened, he decided that he was going to talk, and did talk. There was no coercion that was there, no beating with the rubber hoses. There was no psychological coercion. There was nothing to indicate involuntariness at that particular time. And, again, I don't think that is even a close call."

B. *Standard of Review*

On appeal, we review independently the trial court's legal determination of whether a defendant's statements were voluntary [and] whether his *Miranda* waivers were knowingly, intelligently, and voluntarily made. (*People v. Rundle* (2008) 43 Cal.4th 76,

115.) We evaluate the trial court's factual findings regarding the circumstances surrounding the defendant's statements and waivers, and " ' "accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence." ' " (*Ibid*.) Similarly, the "factual findings by the trial court as to the circumstances surrounding an admission or confession, including ' "the characteristics of the accused and the details of the interrogation" ' " are "subject to review under the deferential substantial evidence standard." (*People v. William*s (1997) 16 Cal.4th 635, 660 (*Williams*); *People v. Jones* (1998) 17 Cal.4th 279, 296 [" ' "the trial court's findings as to the circumstances surrounding the confession─including 'the characteristics of the accused and the details of the interrogation' [citation]─are clearly subject to review for substantial evidence" ' "]; *People v. Guerra* (2006) 37 Cal.4th 1067, 1093 [same].)

C. *Analysis*

1. *Second interview*

Courts must presume that a defendant did not waive his or her *Miranda* rights. (*North Carolina v. Butler* (1979) 441 U.S. 369, 373.) Accordingly, the state must prove waiver by a preponderance of the evidence. (*Colorado v. Connelly* (1986) 479 U.S. 157, 168 (*Connolly*); *People v. Bradford* (1997) 14 Cal.4th 1005, 1033.) The inquiry of whether a valid waiver has been established has two distinct dimensions: "First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." (*Moran v. Burbine* (1986) 475 U.S. 412, 421.) "Second, the waiver must have been made with a

full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." (*Ibid.*)

Courts apply a "totality of circumstances" test to determine the voluntariness of a confession. (*Withrow v. Williams* (1993) 507 U.S. 680,693; *Williams, supra,* 16 Cal.4th at p. 660.) Among the factors to be considered are the crucial element of police coercion, the length of the interrogation, its location, its continuity, the defendant's maturity, education, physical condition, and mental health. (*Williams,* at p. 660; see also *Connelly, supra,* 479 U.S. at pp. 164-167 [emphasizing the element of police coercion as the transgression on constitutional rights].) Due process requirements prohibit the use at trial of involuntary statements obtained by coercive police questioning. (*Connelly,* at p. 167; *People v. Benson* (1990) 52 Cal.3d 754, 778.)

"A confession is voluntary if the [suspect's] decision to speak is entirely 'self-motivated' [because] he freely and voluntarily chooses to speak without 'any form of compulsion or promise of reward.' " (*People v. Thompson* (1980) 27 Cal.3d 303, 327-328.) No single factor is dispositive in determining the question of voluntariness. (*Williams, supra,* 16 Cal. 4th at p. 660; *Connelly, supra,* 479 U.S. at p. 167.)

Here, the evidence supports the trial court's finding that Couturier voluntarily and knowingly waived his *Miranda* rights in the second interview. The evidence shows Detective Maxin informed Couturier of his *Miranda* rights, and Couturier indicated he understood them. As the court noted, his responses to the questions were appropriate, and relevant to the questions asked. There is no evidence the police used physical or psychological pressure, coercion, or threats to elicit statements from appellant. (*People v.*

Whitson (1998) 17 Cal.4th 229, 248-249.) The voluntariness of the appellant's waiver therefore is clear. (See *Connelly, supra,* 479 U.S. at p. 164 ["Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law."]

Moreover, his statements about being under the influence of medications did not render his statements involuntary. *People v. Perdormo* (2007) 147 Cal.App.4th 605 is instructive. In that case, the police interviewed the defendant while he was in the intensive care unit of a hospital. The defendant appeared to be under the influence of medication at the time of the interview. The surgeon who operated on the defendant opined the medication he was on would adversely affect his ability to think clearly. Nonetheless, the Court of Appeal held the defendant's statements were voluntary. In doing so, the court noted his statements did not evidence impaired thinking: "Appellant's speech is slow and deliberate, but not slurred or incoherent. Each of [the] answers is appropriate to the question asked. In some instances, his answers were remarkably detailed." (*Id.* at pp. 617-618.)

In this case as well, the trial court did not err by finding that Couturier's statements were voluntary. Even if we accept his testimony that he was on medication at the time of the interview, our Supreme Court "has repeatedly rejected claims of incapacity or incompetence to waive *Miranda* rights premised upon voluntary intoxication or ingestion of drugs, where, as in this case, there is nothing in the record to indicate that the defendant did not understand his rights and the questions posed to him." (*People v. Clark* (1993) 5 Cal.4th 950, 988; *People v. Breaux* (1991) 1 Cal.4th 281, 301 [rejecting

contention that *Miranda* waiver was involuntary based, in part, on assertion of ingestion of drugs].) As in *Perdomo,* Couturier's relevant and coherent statements in response to Detective Maxin's questions support the court's finding his statements were voluntary.

2. *Third interview*

Nor did officers violate Couturier's *Miranda* rights in the third interview. Police officers must cease questioning a suspect who exercises his right to cut off an interrogation. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1238.) However, "[i]t is not enough for a reasonable police officer to understand that the suspect *might* be invoking his right. [Citation.] Faced with an ambiguous or equivocal statement, law enforcement officers are not required . . . either to ask clarifying questions or to cease questioning altogether." (*People v. Stitely* (2005) 35 Cal.4th 514, 535.)

The record reflects that while Couturier refused to talk after being read his *Miranda* rights, he did not request counsel or demand unequivocally that the interview be terminated. Rather, he stated he wanted to hear what the police had to say. Thereafter, when he requested that he be returned to his cell, the detectives terminated the interview. Couturier himself then reinitiated the interview. This waived his right to remain silent, and his statements thereafter were properly admitted. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 640 [no *Miranda* violation where defendant reinitiated discussion after having invoked his right to counsel]; *People v. Mickey* (1991) 54 Cal.3d 612, 652 [same].)

III. *ADMISSION OF TESTIMONY COUTURIER WAS ON PAROLE*

Couturier asserts that Detective Maxin's testimony he was on parole was unduly prejudicial and should have been excluded. This contention is unavailing.

A. *Background*

Before Detective Maxin testified, the prosecutor requested that he be allowed to admit evidence of Couturier's statement to him in the third interview concerning his parole status. The prosecutor argued it was relevant as it showed intent because Couturier told police he was angry that Froedge was going to go to the police because Couturier was on parole. Defense counsel objected. The court ruled the evidence was relevant to motive and ruled it admissible.

B. *Analysis*

Evidence Code Section 1101 prohibits evidence of past wrongdoing where the evidence is admitted to establish a " 'criminal propensity' " i.e., that the defendant probably committed the instant crime because he has acted unlawfully on other occasions. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 203; *People v. Demetrulias* (2006) 39 Cal.4th 1, 14.) This prohibition does not apply, however, to evidence "relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, . . .) other than [the defendant's] disposition to commit such an act." (Evid. Code, § 1101, subd. (b).) The trial court's determination of whether evidence should be excluded under Evidence Code section 1101 is reviewed on appeal for an abuse of discretion. (*People v. Memro* (1995) 11 Cal.4th 786, 864; *People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1609.)

"[E]vidence of [past] misconduct . . . ' ". . . requires extremely careful analysis" ' and to be admissible, such evidence ' "must not contravene other policies limiting admission, such as those contained in Evidence Code section 352." '[3] [Citation.] Thus, '[t]he probative value of the uncharged offense evidence must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury.' " (*People v. Lewis* (2001) 25 Cal.4th 610, 637.)

Here, the court did not err in admitting evidence of Couturier's parole status. Couturier admitted to police he was afraid of Froedge going to police because of his parole status. Thus, the jury could reasonably infer Couturier murdered Froedge to prevent him from going to the authorities. (*People v. Powell* (1974) 40 Cal.App.3d 107, 154-155 [no error to admit evidence of defendant's parole status as evidence of motive to shoot and kill police officer].) Further, Detective Maxin's testimony was not unduly prejudicial. He simply stated what Couturier told him: He could not afford to be in violation of parole. No evidence was admitted as to what type of crime he was on parole for. Accordingly, the court did not abuse its discretion in admitting Couturier's statement.

Couturier asserts it was error to admit evidence of his parole status as there was other evidence tending to show intent. This contention is unavailing: "A criminal trial

---

3 Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

must always be fair. But it need not be fair in the sense of a fair fight: one in which each side has an equal chance to win. We do not handicap the parties to a criminal trial. If each side or the other has overwhelming evidence, it is allowed to use as much as it chooses, subject only to exercise of the trial court's *considerable* discretion under Evidence Code section 352." (*People v. Thornton* (2000) 85 Cal.App.4th 44, 47-48.)

DISPOSITION

The judgment is affirmed.

NARES, Acting P. J.

WE CONCUR:

HALLER, J.

McINTYRE, J.